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Consumer Federation of America

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Hon. Magalie Roman Salas
Secretary
Federal Communications Commission
The Portals
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: In the Matter of Application by New York Telephone Company (d/b/a Bell Atlantic - New York), Bell Atlantic Communications, Inc., NYNEX Long Distance Company, and Bell Atlantic Global Networks, Inc., for Authorization to Provide In-Region InterLATA Services in New York - CC Docket No. 99-295

Dear Secretary Salas:

By motion dated December 23, 1999, AT&T Corp. (AT&T) has asked the Federal Communications Commission (FCC) to stay its order granting Bell Atlantic Corporation authorization to provide long distance service in the State of New York pending judicial review. AT&T's request for a stay of the order should be rejected by the Commission.

Contrary to AT&T's claims, there would be no public purpose served by granting this stay. The only effect of a stay would be to perpetuate the abusive pricing scheme that AT&T has imposed on low volume consumers in New York and elsewhere, protect AT&T's market power in the residential market, and deny consumers substantial benefits from long distance competition.

In evaluating requests that its orders be stayed, the Commission traditionally considers:

(1) the movant's likelihood of successfully challenging the order;
(2) whether the movant will suffer irreparable harm in the absence of a stay;
(3) whether a stay will cause injury to other parties; and
(4) the public interest.

The Commission and the courts will probably hear a lot about the second and third points. The various corporate interests (Bell Atlantic, AT&T and perhaps other competitors)

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will describe in great detail the harm and injury that they will suffer. We do not think there is much likelihood or compelling evidence that any of these corporate interests will be irreparably or significantly harmed either way. They are just seeking to gain whatever competitive advantage they can get. The intensive regulatory structure that is in place in New York and at the FCC simply does not allow either side to be significantly harmed one way or the other. This argues against a stay.

Moreover, we conclude that several of AT&T's main arguments about the other two points fall flat on their face. AT&T's public interest arguments are backwards. AT&T's claims about its likelihood of prevailing on appeal are grossly overstated. This argues strongly against a stay.

PUBLIC INTEREST CLAIMS

AT&T's tortured claims of harm to itself and consumers in the absence of a stay are illogical on their face. AT&T and other competitive local exchange carriers (CLECs) have been selling bundles of local and long distance service in New York for months. Well over 1 million lines are being sold to New Yorkers by CLECs. AT&T and MCI are vigorously promoting their bundled local and long distance service.

Allowing Bell Atlantic to begin selling similar bundles with attractive long distance rate plans would in no way harm the public, even if, at a latter point, it were required to stop. The likely effect of Bell entry would be to force AT&T to offer more attractive long distance plans as part of its bundled. If Bell Atlantic were subsequently forced to cease selling these bundles, the primary harm would fall on Bell Atlantic, not AT&T. Consumer's whose interest in bundles had been stimulated by the increased competition would still be able find them in the marketplace, among Bell Atlantic's competitors. If anything, AT&T would likely benefit, if those customers who are attracted to a bundle sought to replace the Bell Atlantic bundle with one of the others available. The only thing consumers would lose, if Bell Atlantic were forced to exit the long distance market by a court order, would be the more attractive long distance prices that Bell Atlantic offers, but that is a benefit AT&T's proposed stay would deny them altogether.

Disruption of Bell Atlantic's business would be a severe penalty imposed on Bell Atlantic. Indeed, in its comments to the Commission CFA identified business disruption as a way to punish Bell Atlantic if it fails to continue to perform at parity. To claim that allowing Bell Atlantic to enter and then forcing it to exit would harm AT&T or the public is absurd.

The Commission should reject the suggestion that a further "short" delay in introducing long distance competition will not harm the public. The argument that Bell Atlantic has been out of the long distance market for 15 years and the public will suffer no harm if it waits a few more weeks is without merit. The bundled service market in New York, about which AT&T claims to be concerned, has really only existed as a possibility since the

passage of the Telecommunications Act of 1996. It has existed in reality only for a few months.

MCI announced a statewide local service tariff only about six months ago. Even then, AT&T was slow to enter the market. AT&T began vigorous advertising of a bundled offering in New York about three weeks ago. A three week stay would double the amount of time AT&T is in the market pushing its bundled service, while Bell Atlantic could not.

CFA has long recognized the importance of offering these bundles of local/long distance services. Indeed, that is why we have vigorously opposed premature entry of Bell Operating Companies into the long distance market. We have argued that the public will be harmed if the local market is not open and Bell Atlantic were allowed to sell bundles. However, the logic works both ways. Harm also results to the public by preventing BOCs from selling bundles after the local market is open, as the Commission concluded it is. This is especially in light of the abusive pricing practices that have crept into the long distance industry in the past year and a half. Given the newness of the bundled market, the ramp up in competition for bundles in the recent past and the importance of competing for the early adopters in this market, claims that there will be no harm as a result of a stay are wrong.

LIKELIHOOD OF PREVAILING ON APPEAL

The New York State Public Service Commission, which has primary responsibility for overseeing the performance of Bell Atlantic, has concluded that competitors are being treated at parity and demonstrated its determination and ability to ensure that competitors of Bell Atlantic will continue to be fairly treated. The FCC has determined that there is parity and that it can take additional steps to ensure continued parity.

While the Department of Justice (DOJ) raised concerns about certain aspects of the application, the New York State Public Service Commission has explained clearly and convincingly why these concerns do not rise to a level that justifies denial of the application. Since the DOJ looked at the issue, several aspects of the performance plan have been improved as a result of the hearing process. Contrary to some claims, it is a natural and positive part of any proceeding for the Commission to impose conditions and clarify procedures based on the hearing record.

Ongoing disputes between AT&T on the one side and the New York Public Service Commission, the FCC and Bell Atlantic on the other, over specific performance measures do not establish any likelihood that AT&T will prevail on appeal. Bell Atlantic is now subject to over 850 measure of performance. AT&T has chosen a few of these and complain that the failure to hit a statistical target on that measure is disqualifying. The causes of that failure are in dispute. Even if they were known with certainty, it is not clear that parity requires the level of performance indicated by the measure.

AT&T's complaint is nothing more than a he-said, she-said argument about a very small number of statistical parameters where its own operations could be at fault. None of these performance measures was specifically identified in the Act. No single measure is "dispositive" of parity. The judgement of the FCC and the NYPSC is based on the overall performance of Bell Atlantic and should be accepted.

The fact that AT&T chooses to raise the pricing issue as the first substantive issue at this late date is extremely troubling. It reveals that its true agenda here is to forestall long distance competition as long as possible. The pricing issue has been settled in New York for years. To our knowledge, the legality of the existing prices under the Act has not been challenged. Not only is pricing in New York legal, but it is effectively promoting competition. The fact that the current pricing regime in New York will sustain competition is demonstrated by the record in this case.

The New York Commission is commencing another round of pricing proceedings, but this could take years. The possibility that pricing might be improved in the future is not grounds for denying Bell Atlantic entry into long distance in the present. If the Commission (or the courts) were to grant a stay of this order on the basis of the pricing complaint raised by AT&T, it would doom consumers to wait for competition in New York for months if not years to come.

For the above reasons, we urge the Commission to reject the request for the stay.

Respectfully,

Mark N. Cooper
Director of Research